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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 51

Decided: October 30, 1997

This decision addresses the ACE-17 motion in limine[1] filed October 9, 1997, by movants,[2] and the reply filed October 15, 1997, by applicants.[3] In their motion in limine, movants ask us to issue an order limiting applicants' presentation of evidence in rebuttal to the comments and evidence that movants intend to file in this proceeding. Movants request an order imposing limitations on the scope of applicants' rebuttal in response to limitations that movants allege were imposed on them during the discovery process.

BACKGROUND

On July 3, 1997, movants served on applicants certain discovery requests asking for virtually all documents concerning coal shipments and coal rate negotiations by applicants for the years 1978 through the present. Applicants objected to the document requests, claiming that they were overbroad, burdensome, and not likely to lead to the discovery of admissible evidence. In Decision No. 11, served July 18, 1997, Judge Leventhal determined that at least some of the documents were relevant, but limited discovery to: (a) a certain number of years for each applicant; (b) Conrail-served destinations only; and (c) information related only to movants' plants. Movants appealed the judge's decision. In Decision No. 17, served August 1, 1997, we affirmed Judge Leventhal's limits on discovery, finding that the information and documents sought by movants, but excluded by Judge Leventhal, would not assist us in our decision in this proceeding.

In their second set of interrogatories and document requests, served September 4, 1997, movants asked applicants to produce their revenue masking factors applicable to the so-called "1% Waybill Samples" filed with the Board for the years 1978 through the present. Over applicants' objections, Judge Leventhal required the production of revenue masking factors for the years applicants were required to divulge with respect to movants' first discovery request. However, in Decision No. 42, served October 3, 1997, we reversed the judge's decision and denied the discovery request, finding that the disclosure of the masking factors would undermine our policies with respect to the confidentiality of the Waybill Samples. See Decision No. 42, slip op. at 7. We also found

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[1] A motion in limine is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. The purpose of the motion is to avoid injection of irrelevant, inadmissible or prejudicial matters into the trial. Black's Law Dictionary 914 (5th ed. 1979). Movants designated the motion in limine as "ACE, et al.-17," but it is referred to herein as ACE-17.

[2] Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, and Indianapolis Power and Light Company are referred to collectively as movants. A fifth party, The Ohio Valley Coal Company, participated with movants in prior discovery proceedings, but has not joined in the motion considered here.

[3] CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

that the information sought by movants was not shown to be relevant to any legitimate issue in the proceeding. Id.

Although movants disagree with our rulings on the two discovery requests, they contend that applicants' rebuttal submission should be limited in the manner, and to the extent, their discovery requests were restricted in Decision Nos. 11, 17, and 42. Movants specifically request that applicants not be allowed to introduce, in their rebuttal in support of the application, any documentary evidence or information that movants were precluded from examining as a result of the limitations imposed by Judge Leventhal or by us.

Movants argue that a limitation of this sort will not harm applicants because applicants have argued that the information and documents excluded by Judge Leventhal or by us are not relevant to the issues in this proceeding. According to movants, such an order would place the same limitation on applicants that was imposed on them and will preserve procedural due process in the proceeding. Movants contend that a Board order is warranted now to give the parties appropriate notice of the scope of the evidentiary foundation for coal rate issues, the so-called acquisition premium, and jurisdictional threshold matters, so that the parties may prepare their pleadings accordingly. Movants maintain that granting their relief is also appropriate because it would relieve them of the allegedly inadequate alternative of moving to strike evidence that permeates applicants' rebuttal and is impossible to ignore or extricate.

Applicants oppose the motion in limine. Applicants contend that movants seek to prevent us from considering potentially probative evidence simply because movants have filed an overly broad discovery request. Applicants argue that granting movants' motion would encourage in the future unreasonably broad discovery requests, the denial of which could be used by a requester to limit the introduction of evidence by the other party. According to applicants, rather than adopting movants' position, which would preclude the introduction of evidence before its probative value or prejudicial effect could be determined, we should delay any such ruling until comments and supporting evidence, and any rebuttal filings, are considered. Applicants believe that there is no reason that such an approach would not adequately protect the interests of all parties to this proceeding.

DISCUSSION AND CONCLUSIONS

The motion in limine will be denied. So far as we are aware, there is no precedent for granting, or even considering, a motion in limine in Board proceedings. Federal district courts have the ability to exclude evidence in limine pursuant to their power to manage trials, particularly jury trials. Luce v. United States, 469 U.S. 38, 41 n.4 (1984). The use of the motion in limine in federal courts takes two forms. See 21 Wright & Graham, Federal Practice and Procedure: Evidence §5037 (1997). The first of these forms, which Wright and Graham call the "prophylactic motion," is specifically authorized by Federal Rule of Evidence 103(c) and relates to jury trials only. See id.; Fed. R. Evid. 103(c).[4] This sort of prophylactic use of preventing evidence from being heard by a jury is not relevant in a bench trial or, as here, in a regulatory proceeding.

The other recognized use of a motion in limine is to "procure a definitive ruling on the admissibility of evidence at the outset of the trial." See 21 Wright & Graham, supra. However, this proceeding is not a trial. Such use is not specifically authorized by either the Federal Rules of Civil

[4] Our Rules of Practice expressly permit us to consider probative evidence that otherwise would be inadmissible in a jury trial. 49 CFR 1114.1. Moreover, the Supreme Court has made clear that the rules on exclusion of evidence in a jury trial do not apply in administrative proceedings. See Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941) ("[I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed."). See also ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913) ("The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, it is not limited by the strict rules, as to admissibility of evidence, which prevail in suits between private parties.").

Procedure or the Federal Rules of Evidence. Id. Even when motions in limine are used by courts for this purpose, they have recognized that "[m]otions in limine are disfavored"[5] and evidence should be excluded "only when evidence is clearly inadmissible on all potential grounds."[6] When discussing motions in limine, courts have repeatedly stated that evidentiary rulings should be deferred until there is a more concrete evidentiary record, so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." Id.[7]

In fact, this approach was taken by the Southern District of New York in a case cited by movants in support of their motion. See ACE-17 at 4; Wagschal v. Sea Ins. Co. Ltd., 861 F. Supp. 263, 265 (S.D.N.Y. 1994). In Wagschal, the court actually denied a motion in limine, stating that:

> "[i]t is difficult for the court to weigh the probative prejudicial balance before the commencement of a trial" (quoting East Coast Novelty Co. v. City of New York, 842 F. Supp. 117, 119 (S.D.N.Y. 1994). This motion in limine is therefore denied * * * with leave to renew the motion at such time as the precise use of the evidence and any prejudice resulting therefrom is made clear.

As noted above, motions in limine are generally disfavored, particularly in proceedings tried without a jury, and are typically considered only after extensive pretrial proceedings in which the contentions of the parties have been spelled out in substantial detail. At the time movants filed their motion, there has been little or no indication of the positions that the various opposing parties in this case, including movants, may take. Movants are, in effect, asking us to rule on the motion without full knowledge of what issues and supporting evidence are actually in dispute in this proceeding.[8] Thus, until we review the comments of the parties and applicants file their rebuttal to movants' position, it would be premature and inappropriate to foreclose applicants in the way sought by movants.

To the extent that movants believe that they have been unfairly prejudiced by the use of evidence by applicants in their rebuttal filing, movants may file a motion to strike after the rebuttal is filed. This will permit us to make a determination with the benefit of all of the facts before us. See, e.g., Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., No. 40131 (Sub-No. 1) (STB served Oct. 30, 1996) (denying motion to strike surrebuttal materials); Union Pacific RR. Co.−Aban.−Wallace Branch, ID, 9 I.C.C.2d 496, 497 (1993) (granting motion to strike new evidence); International Brotherhood of Electrical Workers, 9 I.C.C.2d 1241, 1244 (1993) (denying motion to strike, but accepting movant's petition to reopen into the record); CSX Transportation, Inc.−Abandonment−In Jasper County, SC, Docket No. AB-55 (Sub-No. 469) (ICC served Dec. 10, 1993) (denying motion to strike railroad's real estate appraisal). There is no indication that these procedures have not fairly protected the interests of all parties in past proceedings or that it would be

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[5] See McClain v. Anchor Packing Co., 1996 WL 164385, *1 (N.D. Ill. 1996) (granting in part and denying in part a motion in limine in a jury trial).

[6] See Hawthorne Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1983).

[7] See also Jonasson v. Lutheran Child and Family Services, 115 F.3d 436, 440 (7th Cir. 1997) ("Some evidentiary submissions, however, cannot be evaluated accurately or sufficiently by the trial judge in such a procedural environment. In these instances, it is necessary to defer ruling until during trial"); United States v. Rusin, 889 F. Supp. 1036, 1038 (N.D. Ill. 1995) (citing Hawthorne); Roberts v. Charter Nat'l Life Ins. Co., 105 F.R.D. 492, 493 (S.D. Fla. 1985) ("When these rulings are made at the time the exhibit is offered in evidence, the trial judge has the benefit of full development of all relevant facts constituting the introductory predicate for admission of the item or statement. Motions in limine rarely provide this factual background.").

[8] While it is true that responsive applications, comments, and requests for conditions were filed on October 21, 1997, movants' submission is one of many that have been filed. We have just begun our review of those voluminous pleadings. Moreover, we have not yet determined whether those filings, including movants', are acceptable under our consolidation rules.

inappropriate under the circumstances of the present proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The ACE-17 motion in limine is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary